Supreme Court, U.S.
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No. 94 478

In The

Supreme Court of the United States

October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 13, 1994

64 pp

QUESTIONS PRESENTED

1. Does an efficient proximate cause analysis apply to the determination of life insurance benefits under a policy governed by ERISA?

2. In determining benefits under a life insurance policy when one contributing peril is covered by the policy and the other contributing peril is expressly excluded by the policy, did the appellate court err in concluding that medical malpractice (a covered peril) was not a predominant cause of the decedent's suicide (an excluded peril), when the trial court had made no such determination?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Ninth Circuit are those in the caption (C.A. No. 92-16693).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Petition	11
I. ERISA Only Preempts State Law Regarding Self-Funded Employee Benefit Plans; Insured Plans Are Subject to Indirect State Regulation	12
II. Both Federal Common Law and California Law Apply An Efficient Proximate Cause Analysis to Insurance Contracts for Accidental Death Benefits	17
Conclusion	21
Appendix	23

TABLE OF AUTHORITIES

Page

Federal Cases

Dow Chemical Co. v. Royal Indem. Co., 635 F. 2d 379, 388, 391 (5th Cir. 1981) 20

FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 409-10, 112 L. Ed 2d 356 (1990) 12, 14, 15

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985) 12, 14, 15

Meusy v. Montgomery Ward Life Ins. Co., 943 F. 2d 1097 (9th Cir. 1991) . . . 20

Nagel v. Continental Cas. Co., 498 F. Supp. 265 (C.D. Cal. 1980) 20

Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98, 102 (5th Cir. 1993) 15-17

State Cases

Arata v. California-Western States Life Ins. Co., 50 Cal. App. 3d 821 (1975) 20

Brooks v. Metropolitan Life Ins. Co., 27 Cal. 2d 305, 163 P.2d 689 (1945) 19

Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395 (1989) 8, 9, 18, 19

Sabella v. Wisler, 59 Cal. 2d 21, 31-32 (1963) 9, 18-20

Federal Statutes

29 U.S.C. § 1144(a) 12, 13

29 U.S.C. § 1144(b) 12

29 U.S.C. § 1144(b)(2)(A) 13

29 U.S.C. § 1144(b)(2)(B) 13

State Statutes

Calif. Ins. Code § 530 18

Calif. Ins. Code § 532 18

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on May 16, 1994. The order denying the petition for rehearing was

filed on June 15, 1994 (App. C).

OPINIONS BELOW

A copy of the District Court's unpublished opinion is attached to this petition in the Appendix (App. A). The decision of the Court of Appeals is likewise unpublished; a copy of the memorandum opinion is attached to this petition in the Appendix (App. B).

JURISDICTION

The memorandum opinion of the court of appeals (App. B) was entered and filed on May 16, 1994. A timely petition for rehearing was denied on June 15, 1994 (App. C). This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*:

29 U.S.C. § 1144(a) [the "preemption

clause"]
29 U.S.C. § 1144(b)(2)(A) [the "saving clause"]
29 U.S.C. § 1144(b)(2)(B) [the "deemer clause"]

STATEMENT OF THE CASE

The plaintiff in this case is the widow of decedent Gene Tortuya, who was a Vietnam veteran with a history of mental disorders, including schizophrenia. From 1985 until his death Mr. Tortuya was treated by a psychiatrist at the Veterans Administration Hospital in Palo Alto, California. At the VA hospital he was treated with several different types of medications on a regular and routine basis. His treating psychiatrist knew of Mr. Tortuya's psychiatric condition.

Mr. Tortuya had been diagnosed at the VA hospital as having recurrent psychotic episode with depressive features as well as a history of psychosis and depression. He had on more than one occasion expressed to doctors at the VA hospital suicidal inclinations. Minnesota Mutual's expert Dr. Litman

testified that Mr. Tortuya's mental illnesses were particularly associated with suicide. [CR 48 ¶ 11 and Ex. E pp. 22-23.] Dr. Wittner, Mr. Tortuya's treating psychiatrist, admitted that he knew Mr. Tortuya's illness was affected by exacerbations of his schizophrenia and by fluctuations in his environment, particularly levels of stress or negative events in his life. [CR 62 ¶ 2, Ex. 10, p. 80.]

In June 1989 Mr. Tortuya began experiencing a period of severe depression. Seeking treatment, Mr. Tortuya visited the Palo Alto VA hospital on June 11, June 14, and June 19, 1989. He was experiencing depression, disorganization, and sleeplessness. On June 14 Mr. Tortuya had not slept in three nights, felt he was in a crisis situation, visited the staff psychiatrist, Dr. George Gulevich, and requested to be hospitalized. [CR 62 ¶ 2, Ex. 11, p. 17.] Dr. Gulevich declined to hospitalize Mr. Tortuya and instead changed his medication. [CR 61 ¶ 20.]

On June 19, the day of his death, Mr. Tortuya told his psychiatrist he "might hurt himself." [CR 48, Ex. E pp. 21-24.] On that day both plaintiff and Mr. Tortuya again requested that he be admitted to the hospital, but he was again declined admission; instead, his medication was changed again and Mr. Tortuya was asked to return in about four weeks. [AB pp. 15-16.]

That evening Mr. Tortuya went to bed at about 9:00 p.m. after taking his medication, but complained thereafter that it was not working; he got out of bed several times and complained that his head was numb and his ears were ringing. At about 11:30 p.m., Mr. Tortuya left the bed again, took a gun from the closet, went into the bathroom, and shot himself.

At the time of his death Mr. Tortuya had two life insurance policies. One policy was obtained through Mr. Tortuya's employment with United Air Lines and his attendant participation in United's Employee Welfare

Benefit Plan. Metropolitan Life Insurance Company issued a group life insurance policy (policy no. 27747-G) that provided benefits in the event of accidental death or dismemberment. The policy expressly excluded benefits for death by "intentionally self-inflicted injury . . . or suicide . . . while sane or insane." [CR 43 ¶¶ 3, 4, Ex. A, p. 4.] United's employee benefit plan was governed by ERISA.

The second policy was under Minnesota Mutual's Group Mortgage Life Insurance, through the home mortgage lender, San Francisco Federal Savings.[1] The policy, which became effective June 8, 1989 (certificate number 0071569149), paid a death benefit to the lender in the event of the insured's

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[1]Plaintiff originally pursued in this action a claim for benefits against Montgomery Ward & Co., which was settled and dismissed with prejudice. [CR 9.]

Incident to her claim against Minnesota Mutual for mortgage credit life insurance benefits, plaintiff named San francisco Savings & Loan Association a party defendant, solely for notice purposes. [ER 2, Complaint ¶ 1(d).] After it was served process, San Francisco Savings & Loan Association requested that it not be copied on further pleadings in the case; their request has been honored by all counsel.

death. No benefit was payable if the insured "die[d] by suicide, whether sane or insane, within two years from the effective date" of the policy. [ER 2, Ex. B; SE 2 p. 4, and Ex. A p.5.]

Both MetLife and Minnesota Mutual conceded that their policies did not exclude benefits for injuries resulting from medical malpractice. [CR 62 ¶ 2, Ex. 12, p. 2; CR 62 ¶ 2, Ex. 13, p. 2.]

Both MetLife and Minnesota Mutual denied benefits on grounds payment was barred by the policies' express suicide exclusions.

Plaintiff brought suit in the California Superior Court for the County of San Mateo against both companies to recover benefits on grounds Mr. Tortuya's death proximately resulted from medical negligence. Defendants MetLife and Minnesota Mutual removed the action to U.S. District Court for the Northern District of California on the basis of federal question (ERISA) and diversity jurisdiction.

The district court granted summary judgment for both insurance companies on grounds benefits were properly denied under the suicide exclusions because Mr. Tortuya killed himself with suicidal intent, and an efficient proximate cause analysis, while it applies to property insurance contracts, is inapplicable to life insurance contracts. The district court alleged that the California Supreme Court had never applied an efficient proximate cause analysis to require the payment of benefits under a life insurance policy and concluded that if the California Supreme Court were to decide such an issue, it would not apply an efficient proximate cause analysis to life insurance contracts. The district court relied on Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395 (1989), opining that the California Supreme Court would not extend Garvey's holding to life insurance claims.

The Ninth Circuit Court of Appeals affirmed the district court's ruling on grounds

(1) Mr. Tortuya killed himself with suicidal intent; (2) medical malpractice was not the predominant cause of Mr. Tortuya's death, *i.e.*, medical malpractice was not the event that set the others into motion, under the tests set out in Sabella v. Wisler, 59 Cal. 2d 21, 31-32 (1963), and Garvey v. State Farm Fire and Cas. Co., 48 Cal. 3d 395, 770 P. 2d 704, 708 (1989); (3) no case has ever applied an efficient proximate cause analysis to a policy governed by ERISA, so the fiduciary did not abuse its discretion in not employing that analysis; and (4) the rule of *contra proferentem* does not apply to this case because no ambiguity exists in the suicide exclusions in the policies.

The Ninth Circuit denied Plaintiff's timely petition for rehearing in which she argued that (1) the appellate court erred in not looking to California law to resolve an issue for which ERISA provides no guidance because the ERISA plan at issue was insured rather than self-funded, (2) the appellate

court improperly invaded the province of the trial court when it concluded medical malpractice was not the efficient proximate cause of Mr. Tortuya's death, and (3) the appellate court erroneously concluded that the rule of *contra proferentem* is inapplicable to the policies at issue.

Plaintiff contends that the proximate cause of her husband's death was the medical negligence of psychiatrists at the Palo Alto Veterans Administration Hospital. They either knew the decedent was suicidal and their failure to administer proper treatment resulted in his taking his own life when proper treatment would have prevented him from so doing, or Mr. Tortuya's suicidal tendencies resulted from the psychiatrists' negligently prescribing inappropriate medications while aware of Mr. Tortuya's depressive, chronic schizophrenic state. In either case, since both life insurance policies covered medical malpractice, material issues of fact existed at the time the trial court

improperly granted defendants' motions for summary judgment.

Since both the district court and the Ninth Circuit applied erroneous legal principles, an injustice resulted that should not be perpetuated.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding insurance contracts governed by ERISA: whether in determining benefits under an ERISA policy a fiduciary may ignore settled state law on a question of law for which ERISA provides no guidance. The Ninth Circuit's ruling in this case permits an ERISA fiduciary to ignore established legal principles regarding interpretation of insurance contracts simply because the Legislature did not speak on a given issue within the text of ERISA. This result is contrary to the intent of the Legislature in enacting section 514 [29 U.S.C. § 1144], the portion of ERISA that prescribes the laws that govern ERISA-regu-

lated contracts and conflicts with the rulings of this Court in FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 409-10, 112 L. Ed 2d 356 (1990) and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728 (1985), which hold that ERISA preempts state law regarding ERISA-regulated plans that are self-funded, but permits state regulation of insured plans.

In addition, both federal common law and state law may be applied to ERISA-governed contracts when ERISA is silent on an issue.

I. ERISA ONLY PREEMPTS STATE LAW REGARDING SELF-FUNDED EMPLOYEE BENEFIT PLANS; INSURED PLANS ARE SUBJECT TO INDIRECT STATE REGULATION

Section 514(a) of ERISA, the "preemption clause," provides that ERISA supersedes all state laws regarding employee benefit plans, except as provided in § 514(b) [29 U.S.C. § 1144(b)] (the "saving clause"). 29 U.S.C. §

1144(a).[2]

The saving clause provides that, except for subparagraph (B) of that section (the "deemer clause"), ERISA does not "exempt or relieve any person from any law of any STATE which regulates insurance . . . ." 29 U.S.C. § 1144(b)(2)(A).[3]

The deemer clause provides that an employee benefit plan may not be deemed an insurance company or any investment company engaged in the business of insurance for the purposes of state regulation of insurance companies or insurance contracts. 29 U.S.C. § 1144(b)(2)(B).[4]

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[2]29 U.S.C. § 1144(a) [the "preemption clause"] provides in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan.

[3]29 U.S.C. § 1144(b)(2)(A) [the "saving clause"] provides in pertinent part:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

[4]29 U.S.C. § 1144(b)(2)(B) [the "deemer clause"] provides in pertinent part:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be

The deemer clause exempts from state regulation all self-funded employee benefit plans because these plans may not be deemed insurance companies. FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed 2d 356, 366 (1990).

By contrast:

> [E]mployee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer.

Id. (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 734, 735, 747, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (articulating distinction created by Congress in the deemer clause between insured and uninsured employee benefit plans, the former

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an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

open to indirect state regulation while the latter not).

The MetLife policy here at issue is clearly insured because United Air Lines purchased the plan from Metropolitan Life Insurance Company. As such, it is thus subject to indirect state regulation under the deemer clause, as held in Holliday, and Metropolitan Life.

In addition, when ERISA is silent on a subject, federal courts look to state law or general principles of common law that may be persuasive. Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98, 102 (5th Cir. 1993).

In Moore the plaintiff claimed accidental death benefits under an ERISA-governed policy from her employer that insured her and her husband after her husband died in a one-car collision. Mr. Moore had had a brain tumor that caused him either to lose consciousness or to have a seizure, which caused the accident.

The policy at issue, which covered injury resulting from "accident[s] resulting directly and independently of all other causes of loss covered by this policy," excluded coverage for "[a] disease or infirmity of the mind or body." Id. at 100.

The district court held that the policy exclusion excluded a loss contributed to by a bodily infirmity or disease only when that infirmity or disease was a concurring proximate cause of death but not when the infirmity or disease was merely a remote cause. Id. at 102. The court instructed the jury that in order to show that coverage was excluded under the policy, it was insufficient for the insurance company to show that the brain tumor contributed to the accident and resulting fire (which caused the death), but instead had to prove that the brain tumor contributed to the death.

On appeal the insurance company argued that the instruction improperly required it to prove that the brain tumor was a concur-

rent proximate cause of the death to fit within the exclusion. Since ERISA did not speak to the question, the Fifth Circuit looked to another Fifth Circuit case whose facts were substantially similar to those in Moore that had applied Texas state law to resolve the issue.

By the same token, the Ninth Circuit should have looked to California state law to resolve the question here at issue rather than simply begging the question. While the facts in Moore are not substantially similar to the facts here at issue, Moore nonetheless establishes that issues of proximate cause, which are not covered by ERISA, must be resolved and that courts look to state law in order to resolve such questions.

II. BOTH FEDERAL COMMON LAW AND CALIFORNIA LAW APPLY AN EFFICIENT PROXIMATE CAUSE ANALYSIS TO INSURANCE CONTRACTS FOR ACCIDENTAL DEATH BENEFITS

In California an insured is entitled to coverage when a peril insured against was the

proximate cause of the loss. Calif. Ins. Code § 530.[5] The insured may nonetheless be denied benefits if the loss would not have occurred "but for" a specifically excluded peril. Calif. Ins. Code § 532.[6] Reading the two statutes together, the "but for" clause of § 532 refers to the proximate cause of the loss, and the "immediate cause" refers to the cause most immediate in time to the loss. Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395, 402-403 (1989) (citing Sabella v. Wisner, 59 Cal. 2d 21, 33-34 (1963)).

This analysis, referred to as an "efficient proximate cause" analysis, applies to first-party insurance claims. Id. at 401-

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[5]The text of Calif. Ins. Code § 530 is as follows:

> An insurer is liable for loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

[6]The text of Calif. Ins. Code § 532 is as follows:

> If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted.

404. Under this doctrine when both an excluded peril and a covered peril contribute to a loss, the insured may still recover if the covered peril was the efficient proximate cause of the loss. Id.

The efficient proximate cause of a loss is the predominating cause or the one that sets other causes in motion. Id. at 402-03. It is "the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster." Id. at 402 (quoting Sabella v. Wisner, 59 Cal. 2d 21, 31-32 (1963)).

This doctrine applies to first-party losses,[7] whether they refer to property claims or accidental death benefits. Garvey, 48 Cal. 3d at 406-08 (claim for property damage). *See* Brooks v. Metropolitan Life Ins. Co., 27 Cal. 2d 305, 163 P.2d 689 (1945)

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[7]A claim is first party if the insured claims coverage for loss or damage sustained by the insured; it is third party if it claims coverage against liability of the insured to another. Garvey, 48 Cal. 3d at 399, n.2.

(efficient proximate cause analysis applied to claim for accidental death benefits) (relied on in Sabella, 59 Cal. 2d 21); Arata v. California-Western States Life Ins. Co., 50 Cal. App. 3d 821 (1975) (double indemnity accidental death benefits).

Federal courts have also applied efficient proximate cause to determine when benefits are payable when a death results from both covered and excluded perils. *See* Meusy v. Montgomery Ward Life Ins. Co., 943 F. 2d 1097 (9th Cir. 1991) (benefits denied when proximate cause analysis revealed no link between outer ear injuries from car accident and suicide that occurred three months later); Dow Chemical Co. v. Royal Indem. Co., 635 F. 2d 379, 388, 391 (5th Cir. 1981) (Texas law of efficient proximate cause applied); Nagel v. Continental Cas. Co., 498 F. Supp. 265 (C.D. Cal. 1980) (insured entitled to benefits after decedent died in hospital while being cared for cancer and adrenal insufficiency, excluded perils, but died from chok-

ing on vomit, a covered "accident").

Clearly, if the Ninth Circuit had looked to California law, or federal common law, then an efficient proximate cause analysis applied to determine whether the loss at issue (Mr. Tortuya's death) was predominately caused by medical malpractice or whether medical malpractice was the cause that set other causes in motion, *i.e.*, whether medical practice caused Mr. Tortuya to commit suicide.

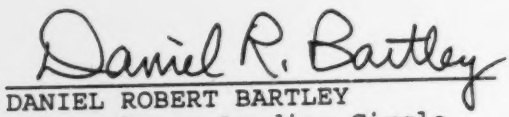
Neither the district court nor the Ninth Circuit ruled that as a matter of law medical malpractice was not an efficient proximate cause of Mr. Tortuya's death. Consequently, the issue was one of fact that should have been considered in determining whether the fiduciary abused its discretion in denying benefits. Likewise, causation was a question of fact that should have prevented the granting of summary judgment in the trial court.

CONCLUSION

The petition for certiorari should be

granted.

Respectfully submitted,



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September 9, 1994

APPENDIX

APPENDIX "A"

District Court Opinion

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRESENCIA B. TORTUYA, Plaintiff, v. METROPOLITAN LIFE INSURANCE COMPANY, MINNESOTA MUTUAL LIFE INSURANCE COMPANY, MONTGOMERY WARD LIFE INSURANCE COMPANY, and SAN FRANCISCO FEDERAL SAVINGS AND LOAN ASSOCIATION, inclusive, Defendants.	Case No. C 90-3491 ORDER **FILED JUL 20 1992** **RICHARD W. WIEKING** **CLERK, U.S. DISTRICT COURT** **NORTHERN DISTRICT OF CALIFORNIA** **ENTERED IN CIVIL DOCKET JUL 23 1992**

This matter comes before the court on the motions of defendants Minnesota Mutual Life Insurance Company (Minnesota Mutual") and Metropolitan Life Insurance Company ("Met-Life") for summary judgment. In addition, plaintiff Tortuya moves to strike declarations made in support of Minnesota Mutual's and MetLife's motions. After a review of the briefs, the court finds it appropriate to submit the motions on the pleadings pursuant

to Local Rule 220-1. The court hereby GRANTS defendants' motions for summary judgment. Plaintiff's motions to strike are DENIED.

I. FACTS AND BACKGROUND

On June 19, 1989, plaintiff's insured decedent, Gene Tortuya, killed himself with a single gunshot wound to the head. Approximately two weeks earlier, the decedent had applied for life insurance under Minnesota Mutual's group mortgage life [page 2] insurance plan through his home mortgage lender, San Francisco Federal Savings. The insurance became effective on June 8, 1989. The insurance pays a death benefit to the home mortgage lender, the amount of which depends upon the mortgage balance.

Minnesota Mutual denied San Francisco Federal Savings' claim for the death benefit (placed in August of 1989), due to the policy's exclusion for death "by suicide, whether sane or insane, within two years from the effective date" of policy coverage. The beneficiary under the policy, Cresencia

Tortuya, Mr. Tortuya's wife, now sues Minnesota Mutual to collect the home mortgage credit she believes is due to her under the policy.

Decedent, an employee of United Airlines, was also a participant of United's Employee Welfare Benefit Plan ("United Plan"), issued through MetLife. The policy provides accidental death benefits. It is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001, et seq.

MetLife denied plaintiff's claim for the accidental death benefit because it determined that Mr. Tortuya's death was not an accident under the terms of the MetLife policy, and because recovery for suicide or intentionally self-inflicted injuries is specifically excluded under the terms of the policy. MetLife affirmed its initial determination following an administrative appeal. Plaintiff now sues MetLife to recover the accidental death benefits she believes are due to her under the terms of the policy.

Plaintiff's husband was a Vietnam veteran with a history of mental disorders, including schizophrenia. He **[page 3]** threatened to kill himself once in 1981 and again in 1985. From 1985 until his death, he routinely visited his treating psychiatrist at the Veteran's Administration ("V.A.") hospital in Palo Alto, California. He was prescribed several different kinds of medications.

Mr. Tortuya visited a psychiatrist at the V.A. Hospital on June 14, 1989 and was prescribed medication to help him sleep. He returned to the hospital on June 19, 1989 and consulted with his regular psychiatrist, Dr. Wittner. Mr. Tortuya complained that he had trouble sleeping in the night before because he had run out of Benedryl, the medication prescribed to him on his previous visit. Mr. Tortuya requested that he be hospitalization was necessary, as the plaintiff seemed to have improved since his previous visit. Dr. Wittner prescribed more medication to help the patient sleep.

On the evening of June 19, 1989, plaintiff and Mr. Tortuya went to bed at about 9 p.m. Mr. Tortuya was restless and anxious because he could not get to sleep. He asked his wife why the medication was not working. After getting up and going back to bed several times, Mr. Tortuya went to the bathroom, put a rifle in his mouth, and shot himself.

II. DISCUSSION

A. Motion for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no **[page 4]** genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The trial judge must grant summary judgment if the evidence presented is so one-sided that the moving party must prevail as a

matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986).

B. Minnesota Mutual's Motion for Summary Judgment

1. Suicidal Intent

This court is bound to follow the decisions of the California Supreme Court in interpreting California law. Meusy v. Montgomery Ward Life Ins. Co., 943 F.2d 1097, 1099 (9th Cir. 1991). Minnesota Mutual and Mrs. Tortuya agree that California law applies to the case under consideration.

The California Supreme Court has held that a life insurance policy excluding payment of a death benefit if the insured commits "suicide, sane or insane" within two years of the issuance of the policy "exempts insurance company from liability only if the insured, whether sane or insane at the time, committed the act with suicidal intent." Searle v. Allstate Life Insurance Co., 38 Cal.3d 425, 427 (1985). The insurance company has the burden of proving that the death was a sui-

cide and that the act was committed with suicidal intent. Id. at 437.

The Searle court held that in order to negate suicidal intent the plaintiff must bring forth evidence to show that the insured did not understand the physical nature and consequences of the act. Id. at 437. Proof that the act was impelled by an [page 5] irresistible impulse does not negate suicidal intent. Id. at 441.

Defendant has clearly met its burden under the first prong of Searle, which requires that the insurance company prove that the death of the insured was the result of a suicide. Both parties agree that the death was an act of self-destruction, rather than an accident. It is undisputed that Mr. Tortuya got out of bed, took the gun out of his closet, went to the bathroom, put the rifle in his mouth, and shot himself.

Defendant has also met its burden under the second prong of Searle, which requires it to prove that Mr. Tortuya committed the act

with suicidal intent. Whether or not he was sane when he killed himself, defendant has pointed to overwhelming evidence to show that Mr. Tortuya understood the physical consequences of the action he took, and therefore intended to commit suicide. The plaintiff's expert witness stated that the V.A. Hospital should have hospitalized the decedent because he was "involved in a crisis which may well lead to suicide" and that "suicidal intentions were clearly present in Mr. Tortuya at various points during the last ten years". (Commodore Decl., ¶ 11, Exh. E.) Another expert witness for the plaintiff believed that Mr. Tortuya knew the gun was "a lethal weapon and if pointed in this direction, [would be] likely to have lethal consequences". (Willcox Decl., ¶ 11, Exh. F.)

Plaintiff argues that because there is evidence that Gene Tortuya was "delusional" or "lacked the ability to make a meaningful choice between committing and not committing suicide," **[page 6]** this case should go to

trial. Plaintiff relies on Reinking v. Philadelphia American Life Ins. Co., 910 F.2d 1210, 1215-1217 (4th Cir. 1990). This reliance, however, is misplaced because Reinking involved an insurance policy that did not include the "sane or insane" clause included in Mr. Tortuya's policy.

Whether or not Mr. Tortuya could make a "meaningful choice" between committing and not committing suicide is immaterial under the Searle test. Searle requires only that Mr. Tortuya understood the physical nature and consequences of his actions. Searle, 38 Cal.3d at 437. Plaintiff's own expert witness agreed that Mr. Tortuya would know without a doubt that he was putting a loaded gun in his mouth and pulling the trigger. He knew the gun was not flowers or a glass of beer. he knew that the consequences of pulling the trigger while the gun was in his mouth would be very serious or fatal. (Blinder Depo., pp. 13-14.)

Plaintiff also attempts to analogize

Norbeck v. Mutual of Omaha Insurance Co., 3 Wash. App. 582 (1970). In Norbeck, the Washington Court of Appeals upheld an award of accidental death policy benefits to the wife of a man who died of a self-inflicted gunshot wound 82 days after he sustained serious head injuries in a construction accident. It recognized a line of Washington Supreme Court workmen's compensation cases in holding that benefits should be paid if any injury leads to the uncontrollable or irresistible impulse to death by self-destruction. The court found that the accident which produced decedent's head injuries, rather than the self-inflicted gunshot wound, was the actual [page 7] cause of the loss suffered. In so holding, the court relied primarily on Travelers' Ins. Co. v. Melick, 65 F. 178 (8th Cir. 1894).

Norbeck is inapplicable for at least two reasons. First, Norbeck was decided under Washington law, whereas this case is governed by California law. Indeed, the holding in

Norbeck regarding "uncontrollable or irresistible impulse" is directly contrary to Searle, the governing California case. In Searle, the California Supreme court specifically held that suicidal intent could not be negated by proof that the insured killed himself under the compulsion of an irresistible impulse. Searle, 38 Cal. 3d at 427.

Second, even if Washington law were applicable, unlike Norbeck, there is no medical evidence that Mr. Tortuya had suffered organic brain damage prior to the suicide. In this respect, this case is more analogous to Meusy v. Montgomery Ward Life Insurance Co., 943 F.2d 1097 (9th Cir. 1991). In Meusy, the Ninth Circuit held that the testimony did not support a chain of causation between decedent's injuries sustained in an earlier car wreck and an uncontrollable or irresistible impulse to death by self-destruction. Id. at 1099.

2. Medical Negligence as a Concurrent Cause of Decedent's Suicide

Plaintiff alleges that her husband's self-inflicted death proximately and predominantly resulted from medical malpractice, a peril that is not excluded by the Minnesota Mutual life insurance policy. Plaintiff invites this court to apply a causation analysis, normally applied in first party property **[page 8]** insurance cases, to the life insurance context. The court declines to do this.

Plaintiff argues that the medical negligence of the V.A. hospital was the "efficient proximate cause, or predominant cause of the loss" of the insured's life. In support of its "efficient proximate cause" theory, plaintiff cites Garvey v. State Farm Fire & Casualty Co., 48 Cal. 3d 395 (1989). Garvey was an action by insureds to determine and enforce coverage for subsidence damage to a house addition under an "all risk" section of their home owner's insurance policy, even though "earth movement" was an excluded peril under the policy. The California Supreme Court ruled that it was an issue of fact for

the jury to determine the proximate cause of the injury.

The California Supreme Court has never applied the efficient proximate cause analysis to require the payment of benefits under a life insurance policy. "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state's highest court would resolve it." Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482 (9th Cir. 1986).

The California Supreme Court applied Garvey solely to first party property insurance, not to life insurance. Garvey emphasized that first-party property insurance is unique distinguishing it from third-party liability insurance. Id. at 406. Because the California Supreme Court noted the limited nature of Garvey, this court does not believe that it would extend Garvey's holding to cover life insurance claims. This [page 9] court is bound to decline to apply the Garvey analysis in this case. Therefore,

Minnesota Mutual's motion for summary judgment is GRANTED.

C. Metlife's Motion for Summary Judgment

1. Federal Common Law Applies to ERISA Claim

The parties agree that the United Plan in which Mr. Tortuya participated is governed by ERISA. 29 U.S.C. § 1001, et seq. The United States Supreme Court has held that ERISA preempts state law with respect to claims for insurance benefits. Pilot Life Insurance Co. v. Dedaux, 481 U.S. 41 (1987). the Court found that Congress expected that a federal common law of rights and obligations under ERISA-regulated plans would develop. Id. at 56. The careful choice of remedies under the federal scheme would be completely undermined if plaintiffs could obtain state remedies rejected by Congress in enacting ERISA. Id. at 54.

The question in the case before the court is essentially one of contract interpretation. Contrary to plaintiff's argument,

California law does not apply here because California's common law of contract interpretation is not a law that regulates insurance and, therefore, is not saved from preemption under ERISA. Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 494 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989).

2. Standard of Review

Defendant MetLife argues that under ERISA, this court should review its decision to deny plaintiff accidental death **[page 10]** benefits under an "arbitrary or capricious" or "abuse of discretion" standard of review. Plaintiff, on the other hand, argues that this court must review MetLife's decision de novo.

The Supreme Court held that "a denial of benefits [under § 1132 (a)(1)(B) of ERISA] is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115

(1989). Where a court finds that an ERISA plan contemplates discretionary determinations, it must review a fiduciary's eligibility decisions under the plan for abuse of discretion. Williams v. Caterpillar, Inc, 944 F.2d 658, 661 (9th Cir. 1991). In order to determine the proper standard of review to be applied to this case, the court must first determine whether or not MetLife has "discretionary authority" under the terms of the United Plan.

The United Plan provides that "the Insurer [MetLife in this case] or HMO will be solely responsible for the disposition of the claims for benefits." (Warner Supp. Decl., § 6.6, Ex. A). MetLife is responsible for notifying the claimant if the claim is wholly or partially denied. (Warner Supp. Decl., § 6.2, Ex. A). It is also responsible for reviewing denials when requested to do so by claimants. (Warner Supp. Decl., § 6.4, Ex. A). Under the United Plan, MetLife must employ discretion in order to carry out the functions

assigned to it. Therefore, abuse of discretion is the proper standard of review in this case. **[page 11]**

3. MetLife Did Not Abuse its Discretion in Denying Plaintiff's Claim

In determining whether MetLife abused its discretion in denying the plaintiff benefits, the court must examine MetLife's interpretation of the suicide exclusion clause of the "High Limit 24-Hour Personal Accident Insurance" policy. The Policy provides that:

> [I]n no case shall any payment be made for death or any other loss which is cause by: (A) intentionally self-inflicted injury, suicide or any attempt thereof, while sane or insane . . . ."

In Wickman v. Northwestern Nat. Ins. Co., 908 F.2d 1077 (1st Cir. 1990), cert. denied, 111 S.Ct. 581 (1990), the First Circuit outlined the steps the fact finder must take in determining whether or not an injury qualifies as accidental under the terms of an ERISA-regulated insurance policy. The policy at issue in Wickman was an accidental death policy that did not pay benefits if the loss

was either directly or indirectly caused by "suicide or intentionally self-inflicted injury, whether . . . sane or insane." Id. at 1081. The policy, therefore, was similar to the MetLife policy under which Mr. Tortuya participated.

Wickman held that policy terms should be given their plain meaning. Id. at 1084. In determining whether or not an injury was an accident under a policy, the fact finder should begin by examining the expectations of the insured when the policy was purchased. If the fact finder determines that the insured when the policy was purchased. If the fact finder determines that the insured did not expect an injury similar in type or kind to the one suffered, it must then examine whether that expectation was **[page 12]** reasonable. If the fact finder does not have enough evidence to ascertain the insured's subjective expectation, it should then engage in an objective analysis of those expectations. This objective analysis requires that

the fact finder evaluate the expectations from the perspective of a reasonable person in the shoes of the insured. Id. at 1088.

MetLife did not abuse its discretion in determining that a reasonable person should have expected that putting a loaded rifle in his mouth and pulling the trigger would cause great injury or death. Using information from the police report and the death certificate, MetLife determined that Mr. Tortuya died of a self-inflicted injury; as a result, MetLife did not owe his beneficiary, the plaintiff, policy benefits. MetLife's decision that Mr. Tortuya's death cannot be objectively viewed as an accident was both rational and plausible.

In attempting to persuade this court that MetLife's motion for summary judgment should be denied, plaintiff has relied primarily on Searle, a case decided by the California Supreme Court. Because ERISA preempts state law claims, Searle does not apply here. Searle is also inapplicable here because it

involved a life insurance policy, not an accidental death policy. As discussed supra, plaintiff's claim would fail even if Searle did apply. Plaintiff has made no attempt to distinguish Wickman the key case on the issue under consideration.

[page 13] While plaintiff may have stated a cause of action against the United States for medical malpractice,[1] that claim has no relevance to the disposition of this case. For reasons stated supra, the court declines to apply an "efficient proximate cause" analysis in this case. Although the court recognizes the tragedy of Mr. Tortuya's death, it cannot allow Mrs. Tortuya to collect insurance benefits to which she is not entitled.

D. Plaintiff's Motion to Strike

Plaintiff moved to strike various declarations made by defendants in support of summa-

[1]Indeed, plaintiff currently has pending before this court a related case against the United States, Tortuya v. United States, C 91-0338 BAC.

ry judgment. The defendants have cured any defects in the declarations upon which the court relied by submitting supplemental declarations. Plaintiff's motions to strike are therefore DENIED.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that defendants' Minnesota Mutual and MetLife motions for summary judgment are GRANTED. Plaintiff's motions to strike defendants' declaration supporting summary judgment are DENIED.

IT IS SO ORDERED.

Dated: 7/20/92

s/
Barbara A. Caulfield
United States District
Judge

APPENDIX "B"

Court of Appeals Opinion

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRESENCIA B. TORTUYA, Plaintiff-Appellant, v. METROPOLITAN LIFE INSURANCE COMPANY; THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY, Defendants-Appellees.	)	No. 92-16693 D.C. No. CV-90-03491-BAC MEMORANDUM*

FILED MAY 16 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court for the Northern District of California
Barbara A. Caulfield, District Judge, Presiding

Argued and Submitted
February 9, 1994
San Francisco, California

Before: **HUG**, **FARRIS**, and **O'SCANLAIN**, Circuit Judges.

Appellant Cresencia Tortuya sued Minnesota Mutual Life Insurance Company ("Minnesota

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Mutual") and Metropolitan Life Insurance Company ("MetLife) to recover life insurance benefits after her husband committed suicide and now appeals the district court's grant of summary judgment to the iunsurance companies. We affirm.

I

California law governs appellant's claim against Minnesota Mutual. In order for a suicide exclusion to be valid, the insurer must prove that the decedent acted with suicidal intent. Searle **[page 2]** v. Allstate Ins. Co., 38 Cal. 3d 425, 437-38 (1985). Suicidal intent merely requires that the decedent understood the "nature and consequences of the act." Id.

The evidence is overwhelming that Gene Tortuya ("decedent") understood the nature and consequences of his act, and therefore possessed suicidal intent. First, appellant condedes that decedent got out of bed, looked for the gun because his wife had hidden it from him, found the gun in the closet, went

to the bathroom, put the rifle in his mouth, and shot himself. All of this paints a man with a mission, refuting appellant's contention that the decedent did not "plan[] on killing himself." Second, appellant's own expert witness, Dr. Martin Blinder, stated that "without a doubt" decedent knew that his rifle was "a lethal weapon and if pointed in this direction, it is likely to have lethal consequences." Another one of appellant's own expert witnesses, Evelyn Tabachnick, stated that "suicidal intentions were clearly present in Mr. Tortuya at various points during the last ten years." Third, the appellees' expert, Dr. Robert Litman, stated that decedent intended to kill himself "as pretty much as close to a certainty as one can come within the boundaries of medical evaluation." Finally, the appellant's argument that the decedent was delusional and could not make a meaningful choice is irrelevant under California law. All of the evidence suggests that the decedent understood

the consequences of his act and, thus, had the requisite suicidal intent. Therefore, the district court did not err in granting summary judgment to Minnesota Mutual.

[page 3] II

California law defines efficient proximate cause as "the one that sets others in motion," Sabella v. Wisler, 59 Cal. 2d 21, 31-32 (1963), and as the "predominate cause." Garvey v. State Farm Fire and Cas. Co., 770 P.2d 704, 708 (Cal. 1989). Any alleged medical malpractice is not the event that set the others into motion. It certainly did not make decedent suicidal; indeed, he sought medical help because he was suicidal. At worst, the alleged medical malpractice failed to interrupt the chain of events; this, however, does not constitute efficient proximate cause.

Appellant further argues that "whether the V.A. Hospital committed medical malpractice which could negate suicidal intent, is a triable issue of material fact." This is clear-

ly wrong. Whether his doctors could have prevented decedent's suicide is irrelevant to the fact that he understood the consequences of the act of putting a rifle in his mouth and pulling the trigger.

III

The MetLife policy is governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. ERISA preempts state law with respect to claims for insurance benefits. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

Under ERISA, if the court "finds that a plan contemplates discretionary determinations, it must review a fiduciary's eligibility decisions under the plan for an abuse of discretion." Williams v. Caterpillar, Inc., 944 F.2d 658, 661 (9th Cir. 1991). Such is the case here.

[page 4] To determine whether an ERISA fiduciary abused its discretion, we examine whether the decision was arbitrary and capricious and whether it was supported by sub-

stantial evidence. Madden v. ITT Long Term Disability Plan, 914 F.2d 1279, 1285 (9th Cir. 1990), cert. denied, 498 U.S. 1087 (1991). MetLife denied coverage for two reasons. First, it denied coverage because the policy clearly stated that "in no case shall any payment be made for death or any other loss which is caused by: (A) intentionally self-infliced injury, suicide or any attempt thereof, while sane or insane . . . ." Decedent committed suicide. It is not arbitrary and capricious for MetLIfe to invoke the suicide exclusion clause in this case. Substantial evidence supports its decision that because the decedent committed suicide, benefits were not available.

Second, MetLife also denied coverage because the decedent's death was not an accident. This court must "interpret terms in ERISA policies 'in an ordinary and popular sense as would a [person] of average intelligence and experience.'" Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir.

1990) (quoting Allstate Ins. Co. v. Ellison, 757 F.2d 1042, 1044 (9th Cir. 1985)). Accordingly, given its ordinary usage, the word "accident" would not encompass an intentional act whose consequences are known, such as, the suicide in this case. MetLife's decision that Tortuya's suicide was not an accident was not arbitrary and capricious, and was supported by substantial evidence.

[page 5] Appellant argues that efficient proximate cause should be applied to determine whether she is entitled to benefits under the policy. However, appellant advances (and this court can find) no case law where efficient proximate cause has been applied to a case under ERISA. Consequently, we cannot conclude that the fiduciary in this case abused its discretion in not employing efficient proximate cause analysis. Therefore, the district court did not err in granting summary judgment to MetLife.

IV

The rule of contra proferentem is inappli-

cable in this case because there are not two competing reasonable interpretations. The clear language of the insurance policies excludes death caused by suicide, sane or insane. The district court applied the unambiguous language of the policies. When "an insurer has clearly limited its coverage, the limitation's plain language must be respected." Malcom v. Farmers New World Life Ins. Co., 4 Cal. App. 4th 296, 301 (Cal. App. 4 Dist. 1992) (citation omitted); Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990).

V

Because appellant is not the prevailing party, we decline to award her attorneys' fees. Smith v. CMTA-AIM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984).

AFFIRMED.

APPENDIX "C"

Court of Appeals Order
Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CRESENCIA B. TORTUYA,	)	No. 92-16693
Plaintiff-Appellant,	)	D.C. No. CV-90-03491-BAC
v.	)	
METROPOLITAN LIFE INSURANCE COMPANY; THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY,	)	ORDER
Defendants-Appellees.	)	**FILED JUN 15 1994 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS**

Before: HUG, FARRIS, and O'SCANNLAIN, Circuit Judges

Appellant's petition for rehearing is DENIED.

PROOF OF SERVICE

I declare that I am over the age of eighteen years and am not a party to this action. My business address is 101 Larkspur Landing Circle, Suite 223, Larkspur, California, 94939-1750. I am familiar with and have complied with my employer's practice for collection and processing of correspondence for mailing and for hand delivery.

As set forth below, I caused to be served on the parties in this action:

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This service was accomplished by placing true copies of such document in envelopes addressed to and served upon the following offices:

JAMES R. WILLCOX, ESQ.
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[ATTORNEYS FOR RESPONDENT MINNESOTA MUTUAL LIFE]

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[ATTORNEYS FOR RESPONDENT METROPOLITAN LIFE]

HON. BARBARA A. CAULFIELD, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

450 Golden Gate Avenue
San Francisco, CA 94102-3483
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CLERK, U.S. NINTH CIRCUIT
COURT OF APPEALS
121 Spear Street
San Francisco, CA 94105
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Such service was accomplished by sending such document, on the date set forth below, via Federal Express overnight courier, for delivery by September 13, 1994.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Larkspur, California, on the date set forth below.

I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this declaration was executed on the date set forth below.

DATE: September 12, 1994

Daniel R. Bartley

(2)

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-478

In The

Supreme Court of the United States

October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY

REQUEST FOR JUDICIAL NOTICE

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ATTORNEYS FOR RESPONDENT
MINNESOTA MUTUAL LIFE
INSURANCE COMPANY

October 11, 1994

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54 pp

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
THERE ARE NO VALID REASONS FOR GRANTING THE PETITION AS TO MINNESOTA MUTUAL	3
I. THE CASE BETWEEN PLAINTIFF AND MINNESOTA MUTUAL INVOLVES ONLY THE APPLICATION OF STATE LAW (CALIFORNIA) TO THE PARTICULAR FACTS AND CIRCUMSTANCES OF PLAINTIFF'S CLAIM. THERE IS NO BASIS FOR THE APPLICATION OF FEDERAL STATUTORY OR COMMON LAW.	3
II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS . .	8
III. THERE IS NO FEDERAL QUESTION INVOLVED	8
IV. NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS .	9
V. THERE IS NO CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT	10
VI. THE PETITION MISSTATES THE FACTS AND LAW BELOW .	10
VII. CONCLUSION	13
REQUEST FOR JUDICIAL NOTICE	14
APPENDIX	17

TABLE OF AUTHORITIES

CASES — Page(s)

Searle vs. Allstate Life Insurance Company
38 Cal.3d 425 (1985) . . . 4-6, 9, 10

STATUTES

Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. Section 1001 et seq. 2, 3, 10

No. 94-478

In The

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October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF MINNESOTA MUTUAL LIFE INSURANCE COMPANY

Respondent Minnesota Mutual Life Insurance Company (hereinafter "Minnesota Mutual") hereby submits its Opposition to Petitioner's Petition for Writ of Certiorari.

PRELIMINARY STATEMENT

Petitioner's claim against Respondent Minnesota Mutual involves only state law claims in which this Court can have no interest, namely the application and interpretation of a suicide exclusion in a life insurance policy. There is a distinct and meaningful difference between Respondents Minnesota Mutual and Metropolitan Life Insurance Company. The Metropolitan Life Insurance Policy involved herein was and is part of an Employee Benefit Plan and is governed by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 et seq. Minnesota Mutual's policy of insurance is not part of an employee benefit plan and has never been considered so. It is not governed by ERISA and there has

never been any claim or even suggestion that ERISA had any applicability whatsoever to Minnesota Mutual. This case was removed to District Court on behalf of Minnesota Mutual solely on the basis of diversity of citizenship (Minnesota and California) and amount in controversy. Therefore, the bulk of the Petition for Writ of Certiorari, which deals with ERISA matters, is not applicable to Minnesota Mutual.

THERE ARE NO VALID REASONS FOR GRANTING THE PETITION AS TO MINNESOTA MUTUAL

I. THE CASE BETWEEN PLAINTIFF AND MINNESOTA MUTUAL INVOLVES ONLY THE APPLICATION OF STATE LAW (CALIFORNIA) TO THE PARTICULAR FACTS AND CIRCUMSTANCES OF PLAINTIFF'S CLAIM. THERE IS NO BASIS FOR THE APPLICATION OF FEDERAL STATUTORY OR COMMON LAW.

As conceded by Petitioner at page 6 of the Petition, the Minnesota Mutual policy was a group mortgage life insurance policy issued to Petitioner's

home mortgage lender, San Francisco Federal Savings. This policy paid a death benefit but excluded the benefit if the insured died by suicide, whether sane or insane, within two years of the effective date of the policy. The sole question in the case below was whether the death was by suicide. Both the District Court and the Ninth Circuit found that the death of plaintiff's insured, who killed himself by a single gunshot wound from a semi-automatic 22 with the muzzle placed in his mouth, was suicide.

The seminal case in California with respect to suicide is Searle vs. Allstate Life Insurance Company, 38 Cal.3d 425, 436, 212 Cal.Rptr. 466, 696 P.2d 1308 (1985). That case sets forth a two part burden on the insurance company to prove that the death of the

insured was the result of suicide. First, the insurer must prove that death was by self-destruction. In fact, as set forth in the Ninth Circuit Court of Appeals decision at page A-7 of the Petition "both parties agree that the death was an act of self-destruction, rather than an accident. It is undisputed that Mr. Tortuya got out of bed, took the gun out of his closet, went to the bathroom, put the rifle in his mouth, and shot himself."

Minnesota Mutual also proved the second part of the Searle test, which is that Mr. Tortuya committed the act with suicidal intent. As set forth in part in the Ninth Circuit Court of Appeals decision at page A-8 of the Petition, "defendant has pointed to overwhelming evidence to show that Mr. Tortuya understood the physical consequences of

the action he took, and therefore intended to commit suicide."

As the Ninth Circuit Court of Appeals unquestionably determined, Minnesota Mutual's case involves the application of Searle to the particular facts of this case and nothing more. The U.S. Supreme Court has no interest whatsoever in such state law issues.

Arguing that the insured's suicide was caused by medical malpractice, Petitioner has repeatedly urged various courts to apply the causation analysis normally applied only in first party property insurance cases to the life insurance context. All courts which have considered this argument have declined to do that. As noted by the Ninth Circuit Court of Appeals at page A-13 of the Petition "the California Supreme Court has never applied the

efficient proximate cause analysis to require the payment of benefits under a life insurance policy. 'Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state's highest court would resolve it.' (citations omitted)"

Because no California court has ever applied "efficient proximate cause", as petitioner terms it, to life insurance contract benefits, it can be safely predicted that no state court would apply this doctrine. Even if it were to be applied, that is a question of state law not federal law. This issue is thus not something meriting the attention of the Supreme Court of the United States of America.

Furthermore, there has now been a ruling by the U.S. District Court for the Northern District of California, in

an action being pursued by Petitioner against the Veterans Administration, that Mr. Tortuya's death was not the result of medical malpractice. See Respondent's Request for Judicial Notice. Hence there is no factual basis for an efficient proximate cause analysis, even there were a legal basis for making an argument.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner has alluded to none and there is in fact no conflict between different circuits of the United States Courts of Appeal on any matter relating to the dispute between petitioner and Minnesota Mutual. This is only logical as the dispute involves state law and not federal law.

III. THERE IS NO FEDERAL QUESTION INVOLVED

As noted above, as between

Petitioner and Minnesota Mutual there is no federal statute or federal common law involved.

IV. NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

This case is also well within the accepted and usual course of judicial proceedings, hence certiorari is inappropriate. As noted above, this case involved the application of established California law (Searle) to the particular facts of this case and the Ninth Circuit's refusal to go beyond the California Supreme Court in applying efficient proximate cause analysis. Such decisions can hardly be deemed to have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V. THERE IS NO CONFLICT WITH ANY APPLICABLE DECISIONS OF THIS COURT

Petitioner has cited no case and there is none. In fact, in the Petition under the heading "Reasons for Granting the Petition", there is not one reason given for this Court's exercise of jurisdiction with respect to Minnesota Mutual, a lawsuit not involving ERISA.

VI. THE PETITION MISSTATES THE FACTS AND LAW BELOW

Petitioner's efficient proximate cause argument is nothing more than an exercise in confusion. It ignores the plain words of the policy exclusion and the California Supreme Court's decision in Searle vs. Allstate Life Insurance Company, 38 Cal.3d 425, 436, 212 Cal.Rptr. 466, 696 P.2d 1308 (1985).

As conceded in the Petition, the Minnesota Mutual policy is a policy of life insurance. Hence, benefits are due

if a person dies while covered unless there is an applicable exclusion. Here Minnesota Mutual established that the policy exclusion for death by suicide, whether sane or insane, within two years of the effective date of the policy was applicable. The question to be answered is whether the death was by suicide, not what reason or reasons there might have been that led the deceased to commit suicide.

Petitioner urges that somehow the question of possible medical malpractice plays a role. To the contrary, Minnesota Mutual met its burden of proof as required by California law to establish that the deceased died as a result of an act of self-destruction which was committed with suicidal intent. Petitioner's argument that a death caused by medical malpractice was

not specifically excluded is meaningless. Any suicide is excluded whether caused by medical malpractice, mental illness, physical pain, despair or any of the other reasons that lead people to commit suicide. It is the mode of death, suicide, which governs, not the reasons causing the suicide. There is no requirement in the policy or in the law of litigating the reasons <u>why</u> someone committed an intentional act of self-destruction with suicidal intent. The only question is <u>whether</u> death was caused by an intentional act of self-destruction committed with suicidal intent.

The efficient proximate cause argument amounts to grasping at straws. By virtue of the U.S. District Court's decision in the malpractice action holding that there was no malpractice,

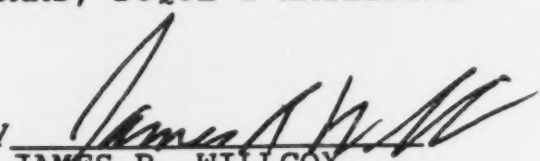
there is no longer any straw at which to grasp.

VII. CONCLUSION

The Petition for Writ of Certiorari as to Minnesota Mutual Life Insurance Company must be denied.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE

By 
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Attorneys for Respondent
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Insurance Company

No. 94-478

In The

Supreme Court of the United States

October Term, 1994

CRESCENCIA B. TORTUYA,

Petitioner,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
and
MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Respondent.

RESPONDENT MINNESOTA MUTUAL'S REQUEST FOR JUDICIAL NOTICE

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ATTORNEYS FOR RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY

October 11, 1994

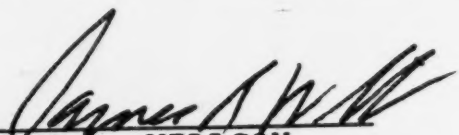
Pursuant to Federal Rule of Evidence 201, Respondent Minnesota Mutual Life Insurance Company hereby requests that the United States Supreme Court take judicial notice of the judgment in an action entitled Tortuya vs. United States of America, U.S. District Court Northern District of California, Action No. C 91-0338 BAC dated September 13, 1994. A true and correct copy of this Judgment is attached hereto.

Under Federal Rule of Evidence 201(f) "judicial notice may be taken at any stage of the proceeding." The above judgment was entered on September 15, 1994 and it was therefore impossible for Respondent to request that judicial notice be taken prior to that date. Judicial notice may be taken by an appellate court even where judicial

notice is raised for the first time on appeal, particularly when judicial notice is requested for the purpose of affirming the decision below. 21 Wright & Graham FEDERAL PRACTICE AND PROCEDURE "Evidence" at 525 (Section 5110).

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE

By 
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APPENDIX

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRESENCIA B. TORTUYA and CRISTETA TORTUYA, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Case No. C 91-0338 BAC MEMORANDUM OPINION

BACKGROUND

This is a wrongful death action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, based upon the suicide of Gene Tortuya. The plaintiffs are his wife and mother who claim that Tortuya's

suicide was caused by the medical negligence of two Veterans Administration ("VA") staff psychiatrists.

FINDINGS OF FACT

1. Gene Tortuya was born September 26, 1948, in the Philippines. He came to the United States at age 19 and, shortly thereafter, entered the Navy for several years and received an honorable discharge in 1971.

2. Mr. Tortuya married Cresencia Tortuya, a licensed registered nurse in California, in 1966. That same year, he began working for United Airlines as an aircraft mechanic, where he was working at the time of his death.

3. Between 1980 and 1984, Gene Tortuya suffered symptoms of psychosis and was, on occasion, treated as an outpatient at the Brentwood Veterans

Administration Medical Center ("VAMC") in Los Angeles. He was prescribed Stelazine which removed the symptoms of his psychiatric problems.

4. Gene Tortuya was hospitalized on two occasions. In July 1984, he voluntarily admitted himself to the Palo Alto VAMC psychiatric unit for approximately two weeks. This admission occurred during a time period of multiple shift changes in employment for Mr. Tortuya, including a change from the graveyard to swing shift. He reported hallucinations and communicated his thoughts about suicide. His illness, diagnosed as an atypical psychosis with depressive features, responded to medication intervention. He was stabilized on three medications: an antipsychotic medication, Perphenazine

(aka Trilafon[1]), an antidepressant medication, Tofranil (aka Imipramine) and, to address the side effects of these medications, Benztropine (aka Cogentin). Seven months later, Mr. Tortuya was admitted to the Palo Alto VAMC on an inpatient basis, after he was placed by police in the Peninsula Hospital for 72 hours psychiatric observation because of his suicidal threats. He became suicidal after an incident at his job for United Airlines. He told co-workers that he would kill himself if he lost his job. He remained at the VAMC for 7 weeks.

5. Thereafter, Mr. Tortuya appeared at the Palo Alto VA Mental

---

[1] Each drug has a chemical name and a brand name, which are often used interchangeably. For convenience in these Findings, the medications will be referred to by brand name, e.g., Trilafon.

Hygiene Clinic ("Clinic") for medication refills. He did not communicate or indicate any further suicidal thoughts to anyone after his 1985 inpatient incident. At no time had he ever attempted suicide.

6. William K. Wittner, M.D., a staff psychiatrist and Clinical Associate Professor at Stanford University, first saw Mr. Tortuya on one of his visits to the Clinic for a medication refill. Mr. Tortuya failed to appear for his scheduled appointments at the psychiatric medication clinic, and later came to the clinic without an appointment for medication refills. He was referred to Dr. Wittner. Dr. Wittner maintained Mr. Tortuya on the same combination of Trilafon, Imipramine, and Cogentin prescribed earlier. Mr. Tortuya remained

relatively symptom free until 1989.

7. On June 14, 1989, Mr. Tortuya came with his wife for an unscheduled clinic appointment and, because Dr. Wittner was not present, consulted another staff psychiatrist, George D. Gulevich, M.D. Dr. Gulevich is a Professor, Department of Psychiatry and Behavioral Sciences, Stanford University School of Medicine and, at that time, had been the Chief of the Clinic for 10 years. Dr. Gulevich's notes from that visit, which he testified he made that same day, are as follows:

> Drop-in MHC [mental health clinic]. Patient and wife came in. Patient looks disheveled and fatigued, has not been sleeping for past three days, is getting disorganized, unable to go to work. Wife states this was the way patient's last decompensation began.
>
> Treatment. Excused medically from work until 6/19. Benadryl, 50 milligrams h.s. fat bedtime) for four nights. Increase Trilafon to 5 tablets (from 4) at bedtime.

Return as necessary, if needs to, before next appointment.

Defendant's Exhibits A, Q.

8. Dr. Gulevich asked Mr. Tortuya broad questions of the kind that usually elicit calls for help: how he was, what the problem was, and why he had come into the Clinic that day. The visit lasted approximately 25 minutes. Dr. Gulevich testified that neither Mr. Tortuya nor his wife requested hospitalization and, if they had, he would have noted the request, considered it and discussed it with them. Dr. Gulevich concluded that Mr. Tortuya was not suicidal or in a crisis, and did not seem likely to harm himself.

Dr. Gulevich addressed Mr. Tortuya's symptoms in two ways. First, he prescribed a small dose of Benadryl to help him sleep. Second, Dr. Gulevich prescribed a slight increase in Mr.

Tortuya's bedtime dose of Trilafon, the antipsychotic medication. In addition, Dr. Gulevich told Mr. Tortuya to return soon to consult with Tortuya's regular doctor, Dr. Wittner. Dr. Gulevich gave Tortuya an excuse from work until Monday, June 19, 1989, and prescribed Benadryl for four nights, through the following Saturday night.

9. On June 19, 1989, Mr. Tortuya returned to the Clinic and consulted with Dr. Wittner for approximately 15 to 25 minutes. Dr. Wittner testified that he asked Mr. Tortuya general questions to elicit information about what was bothering him. Dr. Wittner also testified that it was not his practice to repeatedly ask a patient if he was contemplating suicide, as such a practice suggested to the patient that suicidal thoughts were expected of him.

Wittner's notes from that visit, written contemporaneously with the visit, are as follows:

> [Subjective] - I still can't sleep. I did better with the Benadryl; I ran out.
> [Objective] - Tired. No longer disheveled. Rational.
> [Assessment] - Doing acceptably well, except for insomnia. No side effects, but maybe reported "nervousness" is.
> [Plan] - Will change Imipramine to the more sedating Elavil.
> [Prescription]
> Return to Clinic July 14

Defendant's Exhibits A, Q.

10. Dr. Wittner found that Mr. Tortuya's condition had improved from that reflected by Dr. Gulevich's note of June 14, and that the patient appeared much as he usually had in his past visits with Dr. Wittner. Dr. Wittner addressed Mr. Tortuya's sleep problem in two ways: (1) by replacing his antidepressant Imipramine with the more

sedating antidepressant Elavil at the same dose and frequency; and (2) by continuing the prescription of Benadryl in the same dose as prescribed by Dr. Gulevich. Dr. Wittner continued Mr. Tortuya's regular prescriptions for Trilafon and Cogentin.

Dr. Wittner wrote a note excusing Mr. Tortuya from work until June 21, 1989. Dr. Wittner scheduled his next appointment on July 14, and told him to call or return to the clinic before then if he needed to.

Dr. Wittner, Mr. Tortuya's treating psychiatrist for over three years, found that there were no indications during his June 19, 1989, office visit that Mr. Tortuya was considering suicide or that he was confused, disorganized, or suicidal, or intended to harm himself. Mrs. Tortuya believed that she had

warned both Dr. Gulevich and Dr. Wittner about Mr. Tortuya's past thoughts of suicide and requested hospitalization. In weighing the evidence, the court finds that Dr. Gulevich's and Dr. Wittner's recollections of the appointments are supported by both recollection and notes of the visit. Mrs. Tortuya's recollection is sincere but certainly affected by the gravity of the loss of her husband and not supported by any other witness or notes. Therefore, the court finds that the facts of the conversation of the visit are those reported by Drs. Gulevich and Wittner.

11. After his VAMC visit on June 19, 1989, Mr. Tortuya spent the rest of the day with his wife, Cresencia. She testified that they ate lunch in the Medical Center cafeteria, and her

husband drank coffee. She testified that he was rational for the rest of the day. He drove them in their van to Campbell, California, where they picked up a kitchen counter top and then took it to their house in San Bruno, where the carpenters were waiting to install it. Mrs. Tortuya testified that they went out for an early dinner at a fast food restaurant, Goldilocks, in Daly City, and arrived home early in the evening. She testified that "he was acting normal" throughout the day.

12. Mr. Tortuya took his medication at about p.m. Mrs. Tortuya testified that sh answered a telephone call from her husband's supervisor during the evening, and she heard Mr. Tortuya say that he planned to return to work the following day. As she watched television, he and his

mother-in-law, Mrs. Baticula, laughed and chatted about his plans for an upcoming summer vacation. He went to bed at approximately 9:00 p.m.

13. Cresencia Tortuya received her nurse's diploma in the Philippines, and has been a licensed registered nurse in California since 1975. In June 1989, she was working three days a week at Mills Hospital in San Mateo. Norman Tabachnick, M.D., the plaintiffs' own expert, testified that Mrs. Tortuya was a "qualified evaluator" of her husband's behavior. She neither observed nor heard anything on June 14 or June 19 that indicated to her that her husband would harm himself. She had no indication that Mr. Tortuya was contemplating suicide.

Lolita Baticula, the decedent's mother-in-law who lived in the Tortuyas'

house, testified that she had no indication Gene Tortuya was considering suicide. On June 19, "he expressed neither to me nor anyone else any suicidal thoughts or inclinations whatsoever." See Baticula Declaration, ¶11 (Defendant's Exhibit M). Similarly, the decedent's mother, plaintiff Cristeta Tortuya, testified that during her visit to the Tortuyas' home from June 6 to 17, 1989, she did not observe or hear anything that made her suspect that her son would harm himself. He never talked to her about suicide.

14. At 11:30 p.m. on the night of June 19, 1989, Mr. Tortuya left his bed, removed his gun from the closet, went into the bathroom, placed the loaded .22 caliber semi-automatic rifle in his mouth and pulled the trigger, killing himself.

15. Norman A. Tabachnick, M.D. testified that his standard for hospitalizing possibly suicidal patients was a feeling "that the patient's ability to hold back from being self-destructive is so diminished that the possibility of suicide is close and imminent." Although he testified that Dr. Wittner should have hospitalized Mr. Tortuya on June 19, Dr. Tabachnick based his opinion on Mr. Tortuya's sleep problem and reported nervousness on that date. The court declines to accept Dr. Tabachnick's opinion. Mr. Tortuya had reported these symptoms of sleep deprivation and anxiety to Dr. Wittner on occasions prior to June 1989 without incident. Dr. Tabachnick testified that Mr. Tortuya's suicide had all appearances of being an impulsive act, and that it did not appear that Tortuya

planned it prior to acting. Finally, although Dr. Tabachnick testified that a psychiatrist's history with a patient is an important factor in the psychiatrist's judgments about the patient, he formed his opinion without the knowledge of Dr. Wittner's three-year history with Mr. Tortuya.

16. Jerome A. Motto, the defendant's expert in psychiatry and suicidal states, testified that Dr. Gulevich's treatment on June 14 and Dr. Wittner's treatment on June 19 were within the standard of care, and that neither psychiatrist could or should have known that Mr. Tortuya was likely to commit suicide in the immediate future. In both instances, the psychiatrists appropriately evaluated the situation, addressed Mr. Tortuya's symptoms by slightly altering his

medications, intended to monitor his progress by scheduling another appointment, and invited Mr. Tortuya to return to the clinic as he needed to. The doctors had successfully maintained Mr. Tortuya on medications for over three years, and they had no reason to believe that the medications would not successfully resolve his symptoms in June 1989.

CONCLUSIONS OF LAW

1. The FTCA waives sovereign immunity only for claims against the United States for personal injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ." 28 U.S.C. §1346(b) (emphasis added). The extent of the government's liability is to be determined under the same

principles as those applied to private persons. Moreover, under the FTCA, tort actions against the United States are governed by the "law of the place." Knagley v. United States, 788 F.2d 533 (9th Cir. 1986). Because the allegedly negligent conduct occurred in California, principles of California law apply.

The burden is imposed on the plaintiff, under California law, to establish a defendant's liability for negligence by proving a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury. United States Liability Ins. Co. v. Haidinger Hayes, Inc., 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770 (1970).

2. A psychiatrist's standard of

care for treating psychiatric patients on an outpatient basis is set forth in Bellah v. Greenson, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978). When a patient is under the care of a psychiatrist and the psychiatrist knows that his patient is "likely to attempt suicide," the psychiatrist has a duty to take preventative measures. Id. See also Jacoves v. United Merchandising Corp., 9 Cal. App. 4th 88, 11 Cal. Rptr. 2d 468, 478-479 (1992) (reversed summary judgment, finding triable issue of fact as to whether defendants exercised "the reasonable degree of skill, knowledge, and care ordinarily exercised by medical care providers under similar circumstances in their professional community.")

The California Supreme Court has expressly rejected the notion that a

psychiatrist has an absolute affirmative duty to see that his patient does not harm himself. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 296 n.6, 253 Cal. Rptr. 97, 763 P.2d 948 (1988), cert. denied, 490 U.S. 1007 (1989).

> If such were the case, psychiatrists could be held responsible whenever one of their patients made the unfortunate decision to take his own life. We reject such a broad interpretation . . .

A psychiatrist's duty of care with respect to a patient seen on an outpatient basis is less than his or her duty of care with respect to a hospitalized or institutionalized patient. Bellah v. Greenson, supra, 81 Cal. App. 3d 614, 620, 146 Cal.Rptr. 535, 538 ("Obviously, the duty imposed upon those responsible for the care of a patient in an institutional setting

differs from that which may be involved in the case of a psychiatrist treating patients on an out-patient basis").

3. Plaintiffs failed to prove that Dr. Gulevich's treatment of Mr. Tortuya on June 14, 1989, either breached a duty of care or caused his death. Dr. Gulevich noted that Mr. Tortuya looked disheveled and fatigued, had not been sleeping for three days, was getting disorganized, and was unable to go to work. Accordingly, Dr. Gulevich instructed Mr. Tortuya to increase his bedtime dose of the antipsychotic medication, Trilafon, from four tablets to five. He addressed Mr. Tortuya's sleep problem by prescribing a moderate dose, 50 milligrams, of Benadryl at bedtime for four nights. Benadryl, a drug that Mr. Tortuya had used before and which can be purchased over the

counter, is often used for its side effects -- drowsiness. Dr. Gulevich told Mr. Tortuya to return to the clinic to see his regular doctor, Dr. Wittner, and he gave him an excuse from work until June 19. This treatment by Dr. Gulevich was thoughtful, rational, and well, within the standard of care.

4. Mr. Tortuya returned to the VAMC on June 19, 1989. At that time, it appeared that his condition had improved and he wanted to return to work. He advised Dr. Wittner that he had done better with the Benadryl, but had run out of the prescription. Dr. Gulevich's conduct on June 14, 1989, was within the standard of care and was not "a substantial factor in bringing about" Mr. Tortuya's death. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872 (1991) (a

"substantial factor" is one which is "so indispensable a cause that without it the result would not have followed").

Plaintiffs also failed to prove that Dr. Wittner's treatment of Mr. Tortuya on June 19, 1989, was outside the standard of care. Dr. Wittner assessed Mr. Tortuya's mental status on that date as not actively psychotic, not especially depressed, and not actively suicidal. Mr. Tortuya was hopeful, optimistic, and in touch with reality. Mr. Tortuya expressed readiness and desire to return to work on June 21. Mr. Tortuya demonstrated no objective signs during his visit with Dr. Wittner that he was likely to attempt suicide. Dr. Wittner did not know, nor should he have known, that Mr. Tortuya was likely to attempt suicide that evening. He owed no duty to Mr. Tortuya, therefore,

to take preventative measures against his suicide. See Bellah v. Greenson, supra, 81 Cal. App. 3d 614.

5. There was no evidence that Mr. Tortuya demonstrated suicidal tendencies to anyone on June 19, the date of his suicide. His wife, Cresencia, a licensed registered nurse, spent the entire day with her husband and neither observed nor heard anything that indicated to her that he would hurt himself. He never mentioned suicide to her in the four years before his death. She never considered on June 19 that he would hurt himself, and she did not observe that he was confused. Similarly, the decedent's mother-in-law, Lolita Baticula, who lived with him, testified that she had no indication Mr. Tortuya was considering harm to himself. Nor did the decedent's mother, Cristeta

Tortuya, who visited her son from June 6 to 17, 1989, have any such indication. In addition, Mr. Tortuya spoke to his supervisor on the evening of June 19 and assured him that he intended to return to work the next day. These facts support the finding and conclusion that Dr. Wittner did not know, and reasonably should not have known, that Mr. Tortuya was likely to attempt suicide on that date and, therefore, owed no duty to take preventative measures against his suicide.

6. Plaintiffs failed to establish that defendant breached a duty of care by prescribing new medications for Mr. Tortuya and negligently failed to monitor this medication change within a hospital setting. With respect to Dr. Gulevich's prescription of Benadryl on June 14, he prescribed a small dose

which, according to Mr. Tortuya, helped him to sleep. Dr. Tabachnick testified that Benadryl is a medication which can be purchased without prescription, and is routinely used to help persons sleep. The court concludes that this prescription was reasonable and thoughtful.

The court concludes that Dr. Wittner's prescription on June 19 of the antidepressant Elavil in place of the antidepressant Imipramine was reasonable. Testimony of Drs. Motto and Tabachnick established that Elavil and Imipramine are nearly identical medications chemically, pharmacologically, and physiologically. The primary variation is that Elavil is more sedative. Dr. Wittner substituted the same dose and frequency of Elavil for the Impramine to preserve the

antidepressant effect, and add more sedation.

The court concludes that Dr. Wittner was reasonable in his decision not to monitor this medication change to Elavil from Imipramine by placing Mr. Tortuya in a hospital setting. According to Dr. Wittner, Mr. Tortuya's condition had improved since June 14 and he wanted to return to work. Dr. Wittner's professional judgment, based upon his personal observations of Mr. Tortuya on June 19 and their long-term physician-patient relationship, was that Mr. Tortuya was in stable condition and hospitalization was not necessary. The court finds this judgment was reasonable at the time it was made. See Bellah v. Greenson, supra, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535, 538.

7. After evaluation of the

testimony of Drs. Wittner, Gulevich, and Motto, the court finds that Drs. Gulevich and Wittner maintained the standard of care and did not cause Mr. Tortuya's suicide by prescribing the respective medications 2 on June 14 and 19, 1989.

8. Dr. Tabachnick testified that not all suicides can be prevented, for even he had a patient who committed suicide. He also testified that Mr. Tortuya's suicide was an impulsive act, and that Mr. Tortuya probably did not consider harming himself until he decided, and implemented, his plan to kill himself. Moreover, Dr. Motto testified that Mr. Tortuya received optimal care from the VA and that his suicide occurred in spite of that care. Plaintiffs have not established that Dr. Wittner breached a duty owed to Mr.

Tortuya, or that, even if there was a breach, the breach was a "substantial factor" in bringing about Mr. Tortuya's impulsive act of suicide. Mitchell v. Gonzalez, 54 Cal. 3d 1041, 1054, 1 Cal. Rptr. 2d 913, 920, 819 P.2d 872 (1991).

9. Comparative negligence is the law in California, under which a proportional reduction in plaintiff's recovery is made. Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 829, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975). Mr. Tortuya gave his doctors no information in June 1989 about any new stressors in his life of any thoughts he may have had about harming himself. Similarly, his wife, with whom he had lived through prior crises requiring hospitalization in 1984 and 1985 and with whom he spent virtually all his time in the 10 days before his death, testified she did not

know of his suicidal intentions.

CONCLUSION

1. Plaintiffs have failed to meet their burden of proving negligence by defendant. Accordingly, judgment will be entered in favor of the defendant.

2. Any finding of fact or conclusion of law stated herein which may be considered to be the other is deemed to be such.

IT IS SO ORDERED.

Dated: 9/13/94

Barbara A. Caulfield
United States
District Judge

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and am not a party to this action. My business address is 500 Washington Street, 6th Floor, San Francisco, CA 94111. I am familiar with and have complied with my employer's practice for collection and processing of correspondence for mailing and for hand delivery.

As set forth below, I caused to be served on the parties in this action:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT MINNESOTA MUTUAL LIFE INSURANCE COMPANY; REQUEST FOR JUDICIAL NOTICE

This service was accomplished by placing true copies of such document in envelopes addressed to and served upon the following:

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Such service was accomplished by sending such document, on the date set forth below, via Federal Express overnight courier, for delivery by October 12, 1994.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on the date set forth below.

I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this declaration was executed on the date set forth below.

DATE: October 11, 1994

Janet Curley

JANET CURLEY

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 94-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CRESCENCIA B. TORTUYA,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY

and

MINNESOTA MUTUAL LIFE INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

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November 2, 1994

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	3
I. PETITIONER HAS FAILED TO SHOW A RULE 10 BASIS FOR REVIEW BY THIS COURT	3
II. THE NINTH CIRCUIT CORRECTLY HELD THAT CALIFORNIA STATE LAW OF CONTRACT INTERPRETATION WAS PREEMPTED BY ERISA	4
III. THE NINTH CIRCUIT CORRECTLY INTERPRETED THE PLAN AND POLICY PROVISIONS	5
IV. THE NINTH CIRCUIT CORRECTLY DECLINED TO INCORPORATE STATE LAW THEORIES OF CONTRACT INTERPRETATION INTO FEDERAL COMMON LAW	6
V. THE FIFTH CIRCUIT'S HOLDING IN *MOORE* IS IN HARMONY WITH THE NINTH CIRCUIT'S HOLDING IN THIS CASE; THEREFORE, NO CONFLICT AMONG CIRCUITS EXISTS TO JUSTIFY REVIEW BY THIS COURT	8
CONCLUSION	10
APPENDIX:	
List of Parent Companies and Non-Wholly Owned Subsidiaries of Metropolitan Life Insurance Company Pursuant To Rule 29.1	1a

TABLE OF AUTHORITIES

CASES Page

Evans v. Safeco Life Ins. Co., 916 F.2d 1437 (9th Cir. 1990) 5, 6
Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 5
FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403 (1990) 4, 5
Garvey v. State Farm Fire & Cas. Co., 48 Cal. 3d 395 (1989) 4
Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989) 4, 5
McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) .. 8
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 5
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 4
Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986) 7
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) .. 4, 5, 6
Provident Life & Accid. Ins. Co. v. Waller, 906 F.2d 985 (4th Cir. 1990) 7
Senkier v. Hartford Life & Accid. Ins. Co., 948 F.2d 1050 (7th Cir. 1991) 7
Serrato v. John Hancock Life Ins. Co., 31 F.3d 882 (9th Cir. 1994) 4, 5
Southern Farm Bureau Life Ins. Co. v. Moore, 993 F.2d 98 (5th Cir. 1993) 8, 9
Tortuya v. United States of America, U.S. District Ct., N.D. Cal., No. C91-0338 BAC (September 13, 1994) 2
Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir.), *cert. denied*, 111 S. Ct. 581 (1990) 6

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* 2
ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) 4

TABLE OF CONTENTS—Continued

Page

ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) 4

RULES

United States Supreme Court Rules

Rule 10 ..... 3, 9

Rule 29.1 ..... 1a

IN THE

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OCTOBER TERM, 1994

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CRESCENCIA B. TORTUYA,

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METROPOLITAN LIFE INSURANCE COMPANY

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit United States Court of Appeals' judgment in this case. A copy of that decision, which has not been published, is included in Petitioner's Brief at Appendix "B".

STATEMENT OF THE CASE

Petitioner Crescencia Tortuya commenced this action against MetLife to recover $300,000 in accidental death benefits on account of the death of her husband Gene Tortuya, a participant in the United Airlines, Inc.

("UAL") Employee Welfare Benefit Plan ("Plan"), which is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* MetLife issued its group insurance policy no. 27747-G ("Policy") to UAL to provide certain accidental death and dismemberment benefits to eligible Plan participants.

It is undisputed that on June 19, 1989 Mr. Tortuya committed suicide by shooting himself in the head with a rifle. MetLife, the claim fiduciary for the Plan, determined that Mr. Tortuya's death was not an accident and that therefore no accidental death benefits were payable. Moreover, MetLife determined that Mr. Tortuya's death resulted from suicide or intentionally self-inflicted injury, perils which are expressly excluded from coverage under the terms of the Plan and Policy, and that therefore no accidental death benefits were payable.

Determining that MetLife's claim decision was reviewable under an abuse of discretion standard, the U.S. District Court for the Northern District of California held that, based on the clear terms of the Plan and Policy and the undisputed facts of Mr. Tortuya's suicide, MetLife's denial of Petitioner's claim was not an abuse of discretion, and granted summary judgment in its favor. (*See* copy of District Court's unpublished decision at Appendix "A" of Petitioner's Brief.) The Ninth Circuit affirmed, holding that MetLife's claim decision was both reasonable and based on substantial evidence.

Both the District Court and Ninth Circuit rejected Petitioner's argument that the alleged medical malpractice[1] of Mr. Tortuya's psychiatrists was the "efficient

[1] A U.S. district court has recently ruled that there had been no medical malpractice by Mr. Tortuya's treating psychiatrists. *See Crescencia B. Tortuya and Cristeta Tortuya v. United States of America,* U.S. Dist. Ct., N.D. Cal., No. C91-0338 BAC (September 13, 1994). A copy of this decision is found in Appendix "A" of Respondent Minnesota Mutual Life Insurance Company's Brief In Opposition.

proximate cause" of his death by suicide, and that therefore his death was accidental and benefits should be payable despite the Policy's suicide exclusion. Noting that ERISA insurance policies are governed by uniform federal common law, and that state law theories of contract interpretation, such as "efficient proximate cause," are preempted by ERISA, both the Ninth Circuit and District Court declined to apply such a state law theory to this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER HAS FAILED TO SHOW A RULE 10 BASIS FOR REVIEW BY THIS COURT

Petitioner has failed to present "special or important" reasons why this Court should grant discretionary review on a writ of certiorari under Rule 10. This is simply a case where the trial and appellate courts upheld the reasonable determination of the claim fiduciary which applied the clear and unambiguous terms of an ERISA plan insurance policy to the undisputed facts of the claim. Furthermore, there is no challenge by Petitioner to the propriety of the Ninth Circuit's application of the abuse of discretion standard of review to this case.

Contrary to Petitioner's assertions, the holding of the Ninth Circuit in this case comports with the decisions of this Court that state contract law theories are pre-empted by ERISA and that uniform principles of federal common law govern ERISA plan insurance benefits. Finally, Petitioner has not shown any conflict among the rulings of the federal courts of appeal on the questions she raises. Therefore, this Court should not grant the writ of certiorari.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT CALIFORNIA STATE LAW OF CONTRACT INTERPRETATION WAS PREEMPTED BY ERISA

In its decision, the Ninth Circuit proceeded from the basic premise that "ERISA preempts state law with respect to claims for [ERISA plan] insurance benefits." (Appendix "B", p. B-5, Petitioner's Brief.) *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62 (1987). State laws of contract interpretation (such as the "efficient proximate cause" analysis Petitioner contends should have been applied in this case) are not laws which "regulate insurance" so as to be saved from preemption under ERISA's "saving" clause, § 514(b)(2)(A), 29 U.S.C. §§ 1144(b)(2)(A). *See Pilot Life*, 481 U.S. at 50-51; *Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882, 885-887 (9th Cir. 1994); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

The distinction between insured and self-insured plans which this Court made in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) in analyzing ERISA "deemer" clause, § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), does not control the outcome of the case at bar. Rather, the controlling laws in this case are this Court's holdings in *Pilot Life* and *Metropolitan Life*, which were left undisturbed by *FMC*.

The leading case cited by Petitioner employing the "efficient proximate cause" theory is *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395 (1989). *Garvey* involved a multiple-caused property loss under a homeowner's property policy. *Garvey* represents nothing more than the application of state law contract interpretation principles to a property insurance coverage problem. The "efficient proximate cause" theory is therefore not a law "regulating insurance" under the "business of insurance" analysis of *Pilot Life*, 481 U.S. at 48-51. A state-law theory of contract interpretation simply cannot be equated

with the mandatory benefits statute in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), or the anti-subrogation statute in *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), both of which were held to be saved from preemption. Rather, "efficient proximate cause" is analogous to the California "vesting of benefits" rule in *Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882 (9th Cir. 1994), the California law of insurance policy interpretation in *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437 (9th Cir. 1990), and the California common law of contract interpretation in *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989), all of which were held not to be saved from preemption.

Furthermore, application of peculiar state law theories of contract construction to a case involving ERISA plan benefits runs counter to Congress's express goal of developing the "uniformity of decision which . . . will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws" by means of "a body of Federal substantive law [to] be developed by the Courts . . . ." *Pilot Life*, 481 U.S. at 56, *quoting* H.R. Rep. No. 93-533, p. 12 (1973) and 120 Cong. Rec. 29942 (remarks of Sen. Javits). Because its use conflicts with the structure and purpose of ERISA, the California common law theory of "efficient proximate cause" is preempted through implied preemption. *See FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990). Thus, the Ninth Circuit was correct and in accord with the decisions of this Court in declining to apply the state law "efficient proximate cause" analysis to the facts of the instant case.

III. THE NINTH CIRCUIT CORRECTLY INTERPRETED THE PLAN AND POLICY PROVISIONS

The Ninth Circuit properly interpreted the benefit provisions of the ERISA Plan and Policy in this case under the principles of uniform federal common law. *See Firestone Rubber & Tire Co. v. Bruch*, 489 U.S. 101, 110

(1989); *Pilot Life*, 481 U.S. at 56. Federal common law requires Courts to interpret the terms of an ERISA plan insurance policy according to their plain meaning. *See, e.g., Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990) (ERISA insurance policy terms are to be interpreted in an ordinary and popular sense as would a [person] of average intelligence and experience"); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1084 (1st Cir.), *cert. denied*, 111 S .Ct. 581 (1990) (policy terms "must be given their plain meanings, meanings which comport with the interpretations given by the average person").

The Ninth Circuit noted that the MetLife policy stated clearly and unambiguously that "*in no case shall any payment be made for death . . . which is caused by*: (A) intentionally self-inflicted injury, suicide . . ., while sane or insane" (emphasis in original). It is equally undisputed that Mr. Tortuya committed suicide by purposefully placing a loaded rifle in his mouth and firing it. Both the death certificate and the police report termed the death a suicide. Therefore, the Ninth Circuit correctly upheld MetLife's reasonable determination that no accidental death benefits were payable.

Furthermore, the Ninth Circuit correctly upheld MetLife's denial of benefits because the term "accident" in its ordinary usage was reasonably interpreted as not encompassing Mr. Tortuya's intentional act of suicide.

IV. THE NINTH CIRCUIT CORRECTLY DECLINED TO INCORPORATE STATE LAW THEORIES OF CONTRACT INTERPRETATION INTO FEDERAL COMMON LAW

Given the clear terms of the Policy and the undisputed facts of Mr. Tortuya's death, the Ninth Circuit had no need to incorporate California state law theories of contract interpretation into federal common law. While federal courts may create a substantive federal common law

of ERISA as they see fit, the fashioning of such law should proceed cautiously. *See Provident Life & Accid. Ins. Co. v. Waller*, 906 F.2d 985, 992 (4th Cir. 1990); *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986).

The Ninth Circuit correctly declined to incorporate "efficient proximate cause" analysis into federal common law because, among other reasons, the analysis had not been used in other ERISA accidental death benefits cases. Also, the Ninth Circuit found that the analysis was inapplicable since the alleged medical malpractice was not the event that set other events in motion. The court stated: "[The alleged medical malpractice] certainly did not make decedent suicidal; indeed, he sought medical help because he was suicidal. At worst, the alleged medical malpractice failed to interrupt the chain of events; this, however, does not constitute efficient proximate cause." [2] (Appendix "B," p. B-4, Petitioner's Brief.)

The fact that a U.S. district court has found that there was no medical malpractice on the part of Mr. Tortuya's attending psychiatrists (*see* Appendix "A" of Respondent Minnesota Mutual's Brief In Opposition) removes any factual basis for application of an "efficient proximate cause" analysis to this case. Since Petitioner's arguments for review by this Court rest on the already shaky premise that medical malpractice was the "accidental" cause of Mr. Tortuya's death, her arguments now entirely collapse.

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[2] It might be added that, contrary to Petitioner's assertions, medical malpractice is not *per se* a "covered peril" under the terms of the Plan and Policy. Generally, the consequences of medical malpractice are not considered "accidental" injuries. *See Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050 (7th Cir. 1991). In the case at bar, in particular, the alleged negligent acts of Mr. Tortuya's treating psychiatrists in not hospitalizing him and in changing his medication could not be considered "accidental" events.

V. THE FIFTH CIRCUIT'S HOLDING IN *MOORE* IS IN HARMONY WITH THE NINTH CIRCUIT'S HOLDING IN THIS CASE; THEREFORE, NO CONFLICT AMONG CIRCUITS EXISTS TO JUSTIFY REVIEW BY THIS COURT

Petitioner cites the case of *Southern Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98 (5th Cir. 1993), in support of the proposition that federal courts should look to state law for guidance in ERISA benefits cases. (*See* pp. 15-17 of Petitioner's Brief.) *Moore* does not, however, stand for that proposition and its holding, in fact, parallels and supports the holding of the Ninth Circuit in the case at bar.

In *Moore*, the Fifth Circuit held that an ERISA group life policy did not cover the death of the participant's husband in an automobile collision and fire which occurred after he had lost consciousness due to a brain tumor. The policy language, the court held, clearly and unambiguously excluded recovery in cases where the death was caused or significantly contributed to by disease or bodily infirmity. 993 F.2d at 103-104.

In discussing whether the fact of Mr. Moore's death fit within the policy's exclusion, the Fifth Circuit observed that, if "ERISA does not provide guidance on the issue . . ., this court *may* look to general principles of common law or state law that may be persuasive." 993 F.2d at 102 (emphasis added). Thus, *Moore* does not *require* a court to follow state law in ERISA benefits cases. *See, e.g., McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990) (district court decision applying state law to designation of beneficiary question under ERISA plan was incorrect; court must look to either statutory language of ERISA or to federal common law, or if no answer is found there, "may draw guidance from analogous state law").

In reversing the district court, the Fifth Circuit in *Moore* concluded:

> The purpose and clear meaning of the exclusion clause was to bar recovery in cases where the death of the insured was caused or significantly contributed to by an excluded risk such as a "disease" or "infirmity of the body," even if an accidental injury was the proximate or precipitating cause of death. Southern Farm Life conducted a reasonable investigation, and based on information available to it—including Mr. Moore's original death certificate, autopsy report, and medical records—concluded that Mr. Moore's death was caused or contributed to by a brain tumor. As the plan administrator, it then made a reasonable decision to deny benefits. Considering the evidence available to the administrator and our interpretation of the policy, we hold that the administrator's factual determination that Mr. Moore's death was caused or contributed to by the brain tumor was not an abuse of discretion and that its interpretation of the policy was correct. This case should have never been submitted to a jury.

993 F.2d at 104.

Similarly, in the case at bar the Ninth Circuit concluded that, based on clear and unambiguous language of the Policy's suicide exclusion and the undisputed facts of Mr. Tortuya's suicide, Metlife's decision to deny benefits was reasonable and not an abuse of discretion. Therefore, *Moore* does not provide a Rule 10 basis for review of this case by this Court.

CONCLUSION

Because the Ninth Circuit correctly applied the law of ERISA in this case, and because the issues raised by Petitioner are neither special nor important and therefore do not support a grant of discretionary review on writ of certiorari, the Petition should be denied.

Respectfully submitted,

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Dated: New York, New York
November 2, 1994

APPENDIX

APPENDIX

List of Parent Companies and Non-Wholly Owned Subsidiaries of Metropolitan Life Insurance Company Pursuant To Rule 29.1

ALBANY GENERAL INSURANCE COMPANY LIMITED
AMI PARTNERS INC.
ANTHONY'S ACQUISITION CORP.
ANTHONY'S MANUFACTURING CO., INC.
AVONDALE INCORPORATED
AVONDALE MILLS, INC.
BANCO DE COMERCIO E INDUSTRIA
BLODGETT HOLDINGS, INC.
BRAELAN CORP.
BRIGGS PLUMBING PRODUCTS, INC.
CHART HOUSE ENTERPRISES, INC.
CICERO/CERMAK CORPORATION
CLOVER LEAF, INC.
CP&S COMMUNICATIONS, INC.
CRYSTAL OIL COMPANY
DAN RIVER INC.
ECLIPSE CLAIM SERVICES INC.
FB BRIGGS, INC.
FEDERAL STREET FINANCIAL ADVISERS, INC.
GENESIS SEGUROS GENERALES, SOCIEDAD ANONIMA DE SEGUROS Y REASEGUROS
GRANT TENSOR GEOPHYSICAL CORP.
GS BLODGETT CORPORATION
GS BLODGETT INC.
GS BLODGETT INTERNATIONAL LTD.
HERONFIELD APARTMENTS LIMITED PARTNERSHIP
IGLOO HOLDINGS, INC.
IGLOO PRODUCTS CORPORATION
INMOBILIARIA HOLSANT, S.A.
INTERBROKER, CORREDURIA DE REASEGUROS, S.A.

INTERSTATE BAKERIES CORPORATION
INTERSTATE BRANDS CORPORATION
KOLON-MET LIFE INSURANCE COMPANY
LINCOLN GROUP HOLDING CORP.
LUTHER'S BAR-B-Q, INC.
MAGIKITCH'N, INC.
MANAGEMENT AND RISK INSTITUTE, INC.
MECCO HOLDING, INC.
MEDICAL IMAGING CENTER OF AMERICA, INC.
MET LIFE INTERNATIONAL REAL ESTATE EQUITY SHARES, INC.
METLIFE AGRICULTURAL CREDIT CORP.
METLIFE FUNDING II, INC.
METLIFE INDEPENDENT FINANCIAL SERVICES LIMITED
METPARK FUNDING, INC.
METRIC INCOME TRUST SERIES, INC.
METRIC INSTITUTIONAL APARTMENT FUND, L.P.
METRIC INSTITUTIONAL APARTMENT FUND II, L.P.
METRIC PARTNERS GROWTH SUITE INVESTORS, L.P.
METRIC REAL ESTATE, L.P.
METROPOLITAN HOME LOANS LIMITED
METROPOLITAN LIFE FOUNDATION
METROPOLITAN LIFE INSURANCE SERVICES LIMITED
METROPOLITAN LLOYDS INSURANCE COMPANY OF TEXAS
METROPOLITIAN PLAN MANAGERS LIMITED
METROPOLITAN SERIES FUND, INC.
METROPOLITAN STRUCTURES, INC.
METROPOLITAN STRUCTURES WEST, INC.
MEZZANINE INVESTMENT LIMITED PARTNERSHIP-2
MEZZANINE INVESTMENT LIMITED PARTNERSHIP-6

MEZZANINE INVESTMENT LIMITED PARTNERSHIP-10
MIAF INC. II
MR, INC.
NATIONAL ELECTRONIC INFORMATION CORPORATION
PARK COMMUNICATIONS, INC.
PETERSBURG LONG DISTANCE, INC.
PITCO FRIALATOR, INC.
QUADREAL CORP.
RALPH C. SUTRO, INC.
RB&W CORPORATION
SANTANDER MET, S.A.
SEGUROS GENESIS, S.A. (MEXICO)
SEGUROS GENESIS, S.A. (SPAIN)
SOUTHERN HEALTH PLAN MANAGEMENT, INC.
SSRM SERVICES, INC.
TESORO PETROLEUM CORPORATION
THE GREATER NORTHEAST REAL ESTATE, INC.
TRC ACQUISITION d/b/a THE REGINA COMPANY